NAGAPPA RENGASAMY PILLAI v. LIM LEE CHONG

[F.C. (Barakbah L.P., Azmi C.J. and Ong Hock Thye F.J.) February 19, 1968]

[Penang — Federal Court Civil Appeal No. X13 of 1967]

Practice and Procedure — Appeal from interlocutory order — Leave of Federal Court or of High Court not obtained — Competency of appeal — Courts of Judicature Act, 1964, s. 68(2).

In this case the plaintiff/respondent claimed a sum due on a dishonoured cheque and the defence was that the cheque was only given as a security. The senior assistant registrar gave the defendant/appellant unconditional leave to defend. Upon appeal to the judge in chambers leave to defend was made conditional upon deposit of the amount claimed into court. The matter was subsequently adjourned for further argument on the application of the defendant. After hearing argument the order made in chambers was affirmed. The defendant thereupon appealed to the Federal Court. Leave to appeal had not been obtained from the judge of the High Court or the Federal Court.

Held, dismissing the appeal: as no leave had been obtained from the judge of the High Court or the Federal Court the appeal was incompetent and must therefore be dismissed.

Cases referred to:—

(1) *Re a Debtor* (1903), 19 T.L.R. 152.

(2) *Gordon* v. *Cradock* [1963] 2 W.L.R. 1252.

FEDERAL COURT.

Jag-jit Singh for the appellant.

Lim Kean Chye for the respondent.

Cur. Adv. Vult.

Ong Hock Thye F.J.: Two questions arise in this appeal, the first being an objection by the respondent as to the competency of the appellant to bring this appeal without leave either of the judge of the High Court, against whose judgment the appeal is raised, or of the Federal Court. The second question, which arises only if we dismiss the respondent's objection, is whether the judge had properly exercised, or should have at all exercised, his discretion in setting aside an order of the Senior Assistant Registrar granting the appellant unconditional leave to defend and giving leave conditional upon payment being made into court of the amount claimed.

The claim of the respondent, by specially indorsed writ, was for moneys due upon a cheque drawn in his favour by the appellant, which was dishonoured on presentation; alternatively for moneys lent which were not repaid on due date.

The defence, to sum it up in a few words, alleged that the cheque in question had been given merely as security for an amount to be ascertained, depending on whether a certain transfer of land was to the extent of a 26233/63125 or 26135/63125 share. The Senior Assistant Registrar granted the appellant unconditional leave to defend. Upon appeal by the respondent to the judge in chambers, the leave was made conditional upon deposit being made of the amount claimed into court. Pursuant to the provisions of section 68(2) of the Courts of Judicature Act, 1964, the matter was adjourned for further argument in open court, on the application of the appellant. After hearing counsel the order made in chambers was affirmed. The appellant now appeals to this court against such decision.

In limine the point that now falls to be determined is whether the respondent's objection is valid or not. The order appealed against was manifestly an interlocutory order for the simple reason that it was not a final judgment. Learned counsel has referred us to a reported case, (*Re a Debtor* (1)), but for this elementary proposition, no authority is needed. The relevant provisions of the Courts of Judicature Act, 1964, relating to appeals from interlocutory orders are to be found in section 68(2) which reads:—

> "No appeal shall lie from an interlocutory order made by judge of a High Court in chambers unless the judge has certified, after application, within four days after the making of such order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court."

As further argument in court did take place, the first limb of subsection (2) clearly has no application. That leaves only the second limb, which means, again clearly, that "no appeal shall lie from an interlocutory order . . . unless leave is obtained from the Federal Court or from a judge of the High Court." The dichotomy in subsection (2) is complete and leaves no room for any suggestion that anywhere else in the Act, there are other provisions, perhaps in general terms, which in effect permit a trichotomous interpretation of this subsection. On this point English authorities have no application by reason of the special provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, namely section 31(1)(c) and (i) and subsection (2) as follows:—

> "Restriction on appeals. 31. — (1) No appeal shall lie — . . . (c) from an order of a judge giving unconditional leave to defend an action; . . . (i) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge . . . (2) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section."

The effect of these provisions, which do not appear in our Judicature Act, is explained in *Gordon* v. *Cradock.* (2)

The appellant has failed to obtain leave from the judge and omitted to apply for leave from this court. In my judgment, therefore, the objection must be upheld as valid. As the appeal is incompetent *in limine* on this ground, it is unnecessary to discuss the appellant's grounds of appeal.

I would accordingly dismiss this appeal with costs.

Barakbah L.P. and **Azmi C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Jag-Jit Singh; Lim Cheng Ean & Co.*

ANJALAI AMMAL & ANOR. v. ABDUL KAREEM

[O.C.J. (Chang Min Tat J.) March 2, 1968]
[Penang — Civil Suit No. 317 of 1965]

Land Law — Adverse Possession — Tacking — Privity of contract — Possession of successive trespassers.

The plaintiffs, as administrators of the estate of one *A.N.K.*, claimed for a declaration that they were as such administrators the owners of two pieces of land situate in Penang and for possession from the defendant. The defence to the action was long possession.

A.N.K. acquired the fee simple of the lands in question by purchase for valuable consideration in 1929. He died in 1936. The plaintiffs applied for the grant letters of administration in 1950, but the grant was not extracted until 1965. A short while after acquiring the legal capacity to sue as administrators, they brought this action against the defendant in possession.

The defendant adduced evidence that he married in 1940 one *K* who was living on an adjoining lot to the lands in question. *K*'s evidence was that when she went to live on the adjoining lot in 1939, the lands in question were vacant and she went into occupation and possession shortly afterwards and continued to remain in such possession of the lands. On the evidence the court found that the defendant entered into possession *ab initio* by himself and by his predecessors *qua* trespasser.

Held, dismissing the claim: in this case, on the principle of tacking and by proving privity of contract between him and his predecessors in possession so as to inure to his benefits the entire period of the adverse possession the defendant had established at the institution of the action an unassailable possessory title to the lands.

Cases referred to:—

(1) *Haywood & Anor.* v. *Chaloner* [1967] 3 W.L.R. 1068.

(2) *Chin Wah Kiat* v. *Theynappa Ltd.* [1955] M.L.J. 198.

(3) *Seddon* v. *Smith* (1877), 36 L.T. 168.

(4) *Asher* v. *Whitlock* (1865), 1 Q.B.D. 1.

(5) *Sundar* v. *Parbati* (1899), I.L.R. 12 All. 51; 33 I.C. 371.

(6) *Trustees Executors Agencies Co. Ltd.* v. *Short* (1883), 13 App. Cas. 793.

CIVIL SUIT.

S. Thillaimuthu for the plaintiffs.

Ong Huck Lim for the defendant.

Cur. Adv. Vult.

Chang Min Tat J.: In this action the plaintiffs, suing as the administrators of the estate of A. N. Kathiravaloo, deceased, claim for a declaration that they are as such administrators the owners in fee simple of two pieces of land comprised in Grant No. 168 and known as lots 447(3) and 447(4) Town Subdivision 9 in the North East District of Penang and containing the respective areas of 13.24 poles and 14.14 poles (hereinafter referred to as the lands) and for possession from the defendant. The defence to the action is long possession.

The deceased acquired the fee simple of the lands by purchase for valuable consideration on the 8th August, 1929. On the 30th December in the same year, the deceased mortgaged the lands to one A.R.M.A.R. Muthu Karupan Chettiar. It has been submitted that the mortgage is still outstanding as there is no record of any reconveyance from the mortgagee to the mortgagor or his nominee or nominees, but in the absence of any evidence of any revival of the period of limitation and on the averments in the statement of claim, it would appear that the mortgage is now barred by limitation. In any event, it is not suggested that the mortgage is pertinent to the issue.

The deceased died intestate on the 11th August, 1936. Some time in 1950, the plaintiffs in this action applied for the grant of letters of administration in the estate of the deceased. The grant was made to them on the 23rd May, 1950, but for some reason or other, the grant was not extracted until the 14th September, 1965, some 15 years after. In the meantime, within a year of the deceased's demise, the 1st plaintiff, then a young widow of about 16 years, had married the 2nd plaintiff. As explained by the 1st plaintiff, she took 15 years to extract the grant because she was moving about and not resident in any one place.

A little more than a month after acquiring the legal capacity to sue as administrators, armed with a grant duly extracted, the plaintiffs caused to be issued the writ of summons in this action. It is obvious that the extraction was made for the primary purpose of bringing this action against the defendant in possession.

On an adjoining lot, known as Lot 447(5) T.S. 9 North East District, Penang, stood a house No. 166-E East Jelutong, Penang, and it is in evidence, which is uncontroverted and which I accept, that the mother of Khatijah binti Che Mat Ibrahim (D.W.2) first went with her to live there in 1939, initially as a tenant of the landowner and subsequently, after purchase, in her own right. There would appear to have been subsequent transactions of the fee simple of this adjoining lot in respect of which no clear evidence was adduced, except that the defendant acquired the fee simple in possession on the 7th October, 1958, but the fact remains that D.W.2 is still at the time of the hearing resident in this house.